INDEX.

SUBJECT INDEX.

	Page
The Opinion Below	2
Jurisdiction	2
The Question Presented by Petitioner	3
Statement of the Case	3
Summary of Argument	15
Argument	17
Conclusion	27

TABLE OF CASES CITED.

Barnes Hospital v. Quinlivan, et al., 136 S. W. 2d 332	21
Bowe v. Scott, 233 U. S. 658, 34 S. Ct. 769, 58 L. Ed. 1141	23
Commonwealth v. Hutchins, 232 Mass. 285, 122 N. E. 275, 276 (1, 2)	18
Commonwealth v. Lannan, 153 Mass. 287, 26 N. E. 858, 11 L. R. A. 450, 25 Am. St. Rep. 629	18
Hammerstein v. Superior Court of California, 340 U. S. 622, 71 S. Ct. 521, 95 L. Ed. 586	24
Jenkins v. Jenkins, 243 S. W. 2d 804	2
Koenig v. Leppert-Roos Fur Co. (Mo. App.), 260 S. W. 756	22
Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S. 667, 70 S. Ct. 876, 94 L. Ed. 1194	25
Southern R. Co. v. Durham, 266 U. S. 178, 45 S. Ct. 51, 69 L. Ed. 231	24
State v. January, 353 Mo. 324, 182 S. W. 2d 323	18
Young v. Ragen, 337 U. S. 235, 69 S. Ct. 1073, 93 L. Ed. 1333	24

STATUTES CITED.

28 U. S. C., Section 1257(3)	2
Constitution of the United States, Amendment XIV	3
Section 1563, R. S. No. 1939 (now Sec. 525.040 Mo., R. S., 1949)	20
Section 525.040, Mo. R. S., 1949	23
Section 525.190, Mo. R. S., 1949	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 261

WILLIAM C. BARNETT, PETITIONER,

vs.

ESTHER E. JENKINS, RESPONDENT.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE ST. LOUIS COURT OF APPEALS OF THE STATE OF MISSOURI

and

BRIEF IN SUPPORT THEREOF.

Brief in Support of Reply to Petition for Writ of Certiorari.

THE OPINION BELOW.

The Opinion of the St. Louis Court of Appeals appears at pages 28-33 of the Transcript of Record. It has not yet been officially published, but is reported in 243 S. W. 2d 804.

JURISDICTION.

The Supreme Court of the United States is without jurisdiction to grant the Writ of Certiorari requested by the Petitioner, William C. Barnett, under Title 28, United States Code, Section 1257(3), for the reasons: (1) That no substantial federal question, involving any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States, for the reason that the judgment sought to be reviewed here does not involve a "joint fund" which is immune from garnishment (R. 32), since the Circuit Court and the St. Louis Court of Appeals (R. 33) found that the Petitioner, as Garnishee below, was indebted to defendant, Lawrence Jenkins for fifty percent, or one-half, the settlement recovered or $1970.25, under his contract as attorney for Lawrence Jenkins (R. 30), and that the other half, or $1970.25, only, belonged to Petitioner, as and for his attorney's fee which both the trial Court and the St. Louis Court of Appeals allowed to him in the judgment here attacked; that Petitioner set up no defenses in a Reply required by Section 525.190, Mo. R. S., 1949, to the Denial of the Garnishee's Answers to the Interrogatories (occupying under Missouri law, Sec. 525.190, Mo. R. S., 1949, the same place in such actions as a petition does in an ordinary lawsuit) (R. 32), but Esther Jenkins having conclusively proved that $1970.25 was owing by Petitioner, as Garnishee, to the defendant, Lawrence Jenkins, it was the duty of Petitioner, as Garnishee, to put on his affirmative defenses, which he failed to do either by pleading or proof (R. 33); and since the judgment of the Court does not affect

the attorney's fee claimed, and for which he had a lien and which this very judgment allowed him to satisfy by keeping his attorney fee of $1970.25, the other one-half of the settlement reached, or $1970.25, did not belong to him, and his contention that the one-half ordered paid over by him (which did not belong to him), which was in excess of $1955.00 by $15.25, and which was applied on account of interest thereon, because the execution and garnishment called for 6% interest as well as the $1955.00 due Esther Jenkins, was excessive to the extent of such sum of $15.25, does not raise a substantial federal question involving the application of Amendment XIV. to the Constitution of the United States.

THE QUESTION PRESENTED BY PETITIONER.

The question presented by Petitioner, whether a judgment rendered by a State Circuit Court in excess of the amount claimed and stated in the execution served on Petitioner as Garnishee is in violation of Sec. 1, of the Fourteenth Amendment to the Constitution of the United States, as depriving him of "his" property without due process of law, overlooks the fact that the execution not only called for a principal sum of $1955.00, but "interest thereon at six per cent per annum, and costs of execution" (R. 2). Had Petitioner obeyed the Circuit Court's Order to pay into Court the $1970.25 within 12 days after July 13, 1950, he would not have been concerned with the $15.25 in excess of the principal of $1955.00, because neither the $1955.00 nor the $15.25, totaling $1970.25, and which is just one-half of what he collected for Lawrence Jenkins, belonged to him. If others than Petitioner had any claim to the $15.25 they could have interpleaded for that sum. Certainly, he was not entitled to it.

STATEMENT OF THE CASE.

In the Circuit Court of the County of St. Louis, Missouri, in Esther E. Jenkins, Plaintiff, vs. Lawrence Jenkins, De-

fendant; William C. Barnett, Garnishee, the Petitioner herein, William C. Barnett, was summoned as Garnishee under a garnishment issued in aid of an execution for $1955.00, together with interest thereon at 6% per annum (R. 1, 2), due from defendant, Lawrence Jenkins, under a judgment, in a prior divorce suit in that Court for support money for each of his two minor children, in the total sum of $75.00 per month (R. 2). No goods, chattels or real estate being found by the Sheriff, he summoned the Petitioner, William C. Barnett, as Garnishee, and attached in his hands all debts due and owing from him to said defendant, and all * * * moneys, effects, rights, credits, * * * choses in action and evidences of debt of the defendant, or so much thereof as would be sufficient to satisfy the debt, interest and costs in this suit, and he summoned him to appear before the Court to answer the interrogatories to be exhibited and propounded to him by that plaintiff on the first Monday in May, 1950 (R. 2, 3).

Esther E. Jenkins, on September 26, 1947, had obtained a decree of divorce from Lawrence Jenkins in the St. Louis County Circuit Court, together with the custody and control of their two (2) minor children and an award of 75.00 per month for their support (R. 1, 2). Only $70.00 having been paid on the judgment up to January 12, 1950 (R. 10), she sued out, in said Court, her special execution No. 22,125 (R. 1), and the garnishment in aid thereof, under which she sought to collect said sum of $1955.00, together with interest at 6% per annum and the costs in said proceedings.

The Sheriff, on May 1, 1950, made return that, on January 12, 1950, he served a writ of garnishment in aid of said execution on garnishee (Petitioner herein), attached in his hands all debts due and owing from him to said defendant, Lawrence Jenkins, and all goods, moneys, effects, rights, credits, chattels, choses in action and evidences of debt, or so much thereof as would be sufficient to satisfy the debt, interest and costs in this suit, and by summoning him, in writing, to appear before the Circuit Court of St. Louis

County, Mo., on the first Monday of May, 1950, which was on May 1, 1950, to answer such interrogatories as might be exhibited to him by plaintiff therein (R. 2, 3).

On May 3, 1950, Esther E. Jenkins, the plaintiff, filed such interrogatories, four (4) in number (R. 3). Among other things, No. 1 asked: "At the time of service of the writ of garnishment upon you, to-wit, on the 12th day of January, 1950, had you, or have you since had, or have you now in your possession, custody or charge, any goods, chattels, moneys, credits or effects belonging to the defendant, Lawrence Jenkins?" No. 2 asked: "At the time of the service of the writ of garnishment upon you, to-wit, on the 12th day of January, 1950, were you, or have you since said time become or are you now in anywise indebted to the defendant, Lawrence Jenkins?" No. 3 asked: "At the time of service of the writ of garnishment upon you were you, or have you since that time become, or are you now bound in any contract to pay defendant, Lawrence Jenkins, money which is not yet due?" No. 4 asked: "At the time of service of the writ of garnishment upon you, was the defendant, Lawrence Jenkins, in your employ?" (R. 3, 4).

On May 5, 1950, Garnishee, William C. Barnett (Petitioner here), filed his answers to the interrogatories, to each of which he answered the single word: "No," and prayed to be discharged with compensation for answering (R. 4). This Answer to the Interrogatories was duly sworn to as being true and correct (R. 4).

On May 5, 1950, Esther E. Jenkins filed her statutory Denial (denominated by her as her Reply) to the Answer of the Garnishee to the interrogatories theretofore filed by plaintiff, Esther E. Jenkins (R. 5). This Denial (Reply) pleads in substance that: (1) the Garnishee does have in his possession property belonging to the defendant, Lawrence Jenkins; (2) sets forth that she obtained the decree of divorce on September 26, 1947, and was awarded the care, cus-

tody and control of the minor children there named; that defendant, Lawrence Jenkins, was there ordered to pay her a total of $75.00 a month for the support and maintenance of said minor children; that only $70.00 had been paid her on that account since the date of the decree; and that there is a balance due her, as of the date of the application and execution and garnishment in aid of the execution, the sum of $1955.00, which, together with additions which have accrued under her decree, still remains unpaid and unsatisfied; (3) sets forth Section 1563 R. S. Mo. 1939 (now Sec. 525.040 Mo. R. S., 1949), which provides that the service of the notice of garnishment shall have the effect of attaching all personal property, money, rights, credits, bonds, bills, notes, drafts, checks or other choses in action of the defendant in the Garnishee's possession or charge, or under his control at the time of the service of the garnishment, or which may come into his possession or charge, or under his control or be owing by him, between that time and the time of filing his answer; but that he shall not be liable to a judgment in money on account of such bonds, bills, notes, drafts, checks or other choses in action, unless the same shall have been converted into money since the garnishment, or he fail, in such time as the Court may prescribe, to deliver them into Court, or to the Sheriff or other person designated by the Court (R. 5, 6); (4) that defendant, Lawrence Jenkins, had asserted a claim for damages against his employer, Illinois Terminal Railroad Company, for personal injuries alleged to have been sustained by him while so employed; that Garnishee, William C. Barnett, was employed as defendant's attorney to present the claim; that he filed suit in the Circuit Court of the City of St. Louis, Missouri, therefor, and that a settlement was agreed upon on January 12, 1950, releases and stipulations were executed, and in consideration therefor a draft was received, setting the same out in haec verba, and showing that it was dated January 12, 1950, was made payable to the order of Lawrence J. Jenkins and Wil-

liam C. Barnett, his attorney, in the sum of $3940.50, in full settlement for all claims or damages to the above named persons by Illinois Terminal Railroad Company, at or near St. Louis, Missouri, on or about November 29, 1948. It was directed to the Illinois Terminal Railroad Company, in care of Mercantile-Commerce Bank & Trust Co., St. Louis, Mo., and was signed by Raymond J. Dowd, Claim Agent (R. 6); and (5) that said sum of $3,940.50 represented the balance due under the settlement after deducting sickness benefits payments in the sum of $1,059.50 from the gross amount of the settlement of $5,000.00; that the writ of garnishment had been served on garnishee immediately after the settlement was consummated; that the draft had not been cashed or deposited and had not been endorsed by either of the payees (as far as the plaintiff then knew), but remains in the sole and exclusive possession of the Garnishee; and that this draft constitutes property in the possession of the Garnishee belonging to the defendant (R. 7). To this a prayer was attached, asking for an order directing both the defendant and William C. Barnett, Garnishee, to endorse the draft then believed to be in Garnishee's possession; that he be required to deposit the same in the registry of the Court, and upon their failure to do so, the Clerk be ordered to endorse said check or draft, "and that so much of said funds be paid to plaintiff as will satisfy her claim," and for other relief plaintiff then believed herself entitled to (R. 7).

To this statutory Denial (denominated by plaintiff as her Reply), the Garnishee filed no Reply, or any other pleading; but on June 7, 1950, a jury having been waived by counsel for both parties, this cause was tried by the Court (R. 7) and, on July 13, 1950, resulted in the interlocutory judgment that the Garnishee has in his possession money of the defendant, Lawrence Jenkins, in the sum of $1970.25, declaring an assignment to Garnishee as subject to and inferior to the garnishment proceedings, and ordering Garnishee to pay said sum of $1970.25 to the Sheriff, or into Court, within twelve (12) days (R. 23, 24).

There was evidence for plaintiff, Esther E. Jenkins, that she had obtained the decree of divorce and $75.00 a month for the support of the children on September 26, 1947 (R.

10); a stipulation signed by defendant, Lawrence Jenkins, agreeing to pay such sums to plaintiff, dated September 15, 1947, and signed also by plaintiff, was offered in evidence (R. 9); the decree so providing was also offered in evidence (R. 9); plaintiff testified she had been paid only $70.00 under the decree to that time, and that, at the time of the commencement of these proceedings there was due her the sum of $1955.00, which is just principal, and does not take into account accumulations since the filing of this cause of action, or interest which might be due her (R. 10).

Petitioner, William C. Barnett, the Garnishee, being called by plaintiff as a witness, testified that, as an Attorney-at-law, he represented defendant, Lawrence Jenkins, in connection with the claim for injuries above referred to (R. 12); that he filed the suit, and that it was disposed of by settlement on January 12, 1950; the gross amount was $5000.00; that sick benefits were deducted in the sum of $1059.50, leaving a total amount due Lawrence Jenkins the sum of $3940.50; that on January 12, 1950, a draft was issued to Lawrence J. Jenkins and William C. Barnett, as Attorney, for $3940.50 by the defendant company through their (R. 13) representative; that the draft was made out to the client and his attorney of record; that after that settlement was made, Garnishee was served with a garnishment (R. 13); that between the time that the answer to the interrogatories was prepared, but was not filed because no action could be taken until the return day, which was May 1, 1950—between that time and May 1, 1950, Lawrence Jenkins did not come to the office of Garnishee and did not endorse the check (or draft); that the return day of the writ of garnishment was on May 1, 1950; that Mr. Jenkins endorsed the check on May 2, 1950 (R. 14, 15), and that plaintiff's interrogatories were filed on May 3, 1950 (R. 3, 15); that on May 2, 1950, that check representing the sum of $3940.50 was deposited by Garnishee in a special account in Security National Bank, Savings & Trust Co., in St. Louis, Missouri (R. 15); that the funds are still on deposit in that bank "along with considerable other funds that are there" (R. 15); that those "identical funds are still on deposit at the bank"; that no part of this money has been paid to Law-

rence Jenkins (R. 15); and that upon receipt of the interrogatories by the Garnishee, the only answer he made to them was a categorical "No" to all the questions therein propounded respecting this draft (R. 15, 16).

On the Court's interrogation, Garnishee further testified that, at the time he was served with this garnishment he had a check for $3940.50; that it was made out to Lawrence Jenkins, his client, and William C. Barnett; that he filed a reply to the first interrogatory, and his answer was "No"; that his answers to the 2nd and 3rd interrogatories were likewise "No" (R. 16), and that he never filed any other answers to interrogatories than this to the garnishment (R. 17).

The Petitioner, as Garnishee, and in his own behalf, testified that he was originally employed by Mr. Jenkins on this claim of his on February 17, 1949 (R. 17). Being admonished by the Court that he had not filed anything showing these things he was testifying to; that his answers to the interrogatories was "No," and he did not say anything about a contract between him and Mr. Jenkins by which he was bound to use the money, he testified that he had never had any funds belonging to the defendant in that case, Lawrence Jenkins (R. 17). Being questioned further by the Court, Garnishee testified there had been a settlement for this injury to his client, Lawrence Jenkins; that it was a complete compromise settlement out of Court (R. 18); that the witness dismissed the suit and got a check for $3940.50, "which represented the amount that the company was paying Lawrence Jenkins by reason of his injuries" (R. 18); being asked by the Court: "That wasn't a payment to you, it was a payment to Lawrence Jenkins, that money was?" the Garnishee testified he did not know whether that is correct or not; it was his judgment it was paid to them jointly; that the draft was made jointly to cover his lien for attorney's fees, but he was not sure whether he signed the release or not; but it is his contention that there was nothing coming to Lawrence Jenkins; that is correct; "I owe Lawrence Jenkins nothing" (R. 18).

Subject to Esther E. Jenkins' objections, Garnishee testified that he filed suit under an agreement to pay him 50% of whatever was recovered (R. 19); that witness would

give defendant substantial sums of money from time to time; that when witness had accumulated an indebtedness of about six or seven hundred dollars against his client, the defendant offered to assign this entire claim to him (R. 20); that witness doubted its propriety (R. 20), but he took an assignment of his cause of action, and the settlement was consummated January 12; the assignment was made later, in writing, the original having been oral; that he held the draft unendorsed until after the garnishment period had expired (R. 21); and his Exhibit No. 3, shows that the draft had been changed from a draft into money, after the return date of the garnishment (R. 21).

The Court thereupon summarized that: "The situation is this: There is nothing in the pleadings. To these interrogatories he just says 'No.' Says, 'I have nothing.' 'I have nothing that belongs to Lawrence Jenkins'. On the 12th day of January, 1950, the Sheriff of the City of St. Louis served you with a copy of this writ; then the plaintiff files interrogatories within the three days after the opening of the May Term, and asks you about that, and you say 'No,' that you don't have anything (R. 22).

"The Witness: I could bring in my books and cancelled checks to show the Court what I have advanced this man—

"The Court: (Interrupting) It would be very proper for you to bring in the books and any other evidence you have showing that, but you don't say anything about that in your answer. You just say 'No.' I will be glad to take in all the things you have to offer which constitute proof, subject to plaintiff's objections. I will have to study this matter before I ultimately rule on it." Then the following occurred (R. 22):

"The Witness: I want to make a further statement to the Court. Your Honor will recall calling me at my home, and I talked to you and it was suggested that it would be a good thing to have Jenkins employ other counsel, and you suggested that I write him a letter. A day or two after that he came into my office, and I told him to do so. I said, 'This matter is set for the week of June 5, and Judge Mueller has suggested you have other counsel (R. 22), and I think it

would be advisable for you to have some one there, and I understand—since that time I have been away from my office a great deal on account of illness in the past two weeks —but I understand since that time he came into my office on one occasion, but what he did about consulting another lawyer I don't know, but I carried out the Court's instructions to advise him that he should employ other counsel.' "

"The Court: I don't know that I instructed you to do that.

"The Witness: You suggested it.

"The Court: Because you and Senator Napier had been in my chambers and talked about this matter, and I was somewhat informed concerning it, and I thought probably your situation would be a little inconsistent in this case. Your interests seemed to be rather adverse to your former client, Jenkins, because I understood at that time that you were making claim to at least part of this money (R. 23).

"The Witness: That is right.

"The Court: So the thought came to me because of my observations in these types of matters, that it might be well to ask you to consider the question whether or not you are representing yourself and at the same time representing Mr. Jenkins, whose interests are adverse.

"The Witness: I told him that, and he said he was without funds to employ another lawyer, that he had no money to hire another lawyer, and he didn't know where he could get one (R. 23). I had no way of giving him any further notice. I don't even know where the man lives. I have no idea where he is staying at this time.

"The Court: Is that all your testimony?

"The Witness: I believe that is all, except I would like to cite Your Honor to the statute on these matters" (R. 23).

On this record, the Court took the matter under advisement until July 13, 1950, at which time its interlocutory order was entered, as above described (R. 23, 24).

On July 21, 1950, Garnishee filed his Motion to Amend Judgment and Opinion, and Motion for a New Trial, as to this interlocutory order (R. 24).

After hearing, on July 28, 1950, at 2:00 P. M., the Court did, on July 29, 1950, overrule the Garnishee's Motion for New Trial and to Amend Judgment, and rendered its final judgment in the case, that "Garnishee having failed to pay $1970.25 into the registry of Court as per the interlocutory decree and judgment entered on July 3, 1950, judgment entered in favor of plaintiff and against William C. Barnett, Garnishee, in the sum of $1970.25 and costs" (R. 25).

On August 3, 1950, Garnishee filed his "second" Motion to Amend Judgment (R. 25), which was overruled on October 23, 1950 (R. 26).

On November 1, 1950, Garnishee filed his Notice of Appeal "from the judgment entered in this action on the 29th day of July, 1950," which he stated therein: "became final on the 23rd day of October, 1950" (R. 27).

In its Opinion, the St. Louis Court of Appeals found that Lawrence Jenkins was indebted to Esther E. Jenkins for $1955.00, as a judgment debt; that the garnishment was served on Petitioner, William C. Barnett, on January 12, 1950; that the interrogatories were served on him, to each of which he answered "no"; that Esther Jenkins filed a Denial of his Answer (R. 30, 31); that "Mr. Barnett stated that the draft had been endorsed, and the total amount for which it was drawn was on deposit (R. 30); that Mr. Barnett claimed an attorney's fee equal to 50% of the amount recovered and that "there was due him as his fee" $1970.25; that Jenkins assigned his cause of action to him after Mr. Barnett had been served with the writ of garnishment (R. 30); that the Circuit Court, finding that the assignment, executed subsequent to the garnishment, was inferior to it ordered the Garnishee to pay $1970.25 into Court within 12 days (R. 30), but for failure to do so, the Circuit Court entered a judgment in favor of plaintiff and against the Garnishee (R. 31). The Court of Appeals also found that the "draft" in question was the property of Lawrence Jenkins (R. 31); that "there is no joint fund involved" (R. 32);

that "the fact that the draft named Jenkins and Mr. Barrett, his attorney, as payees did not vest any ownership in Mr. Barnett" (R. 32); that "it was his client's settlement, and Barnett was named as payee in his capacity as attorney for Jenkins, so that he might enforce the lien that he had upon his client's suit"; that "a joint fund means a fund in which two or more persons have a property right" (R. 32); that all the Garnishee had, by reason of his services as attorney, was a lien" (R. 32); that "a lien is not a property right in or to the thing itself, but constitutes a charge or security thereon" (R. 32), so that "the question of joint funds therefore is not in the case" (R. 32); that there was nothing in the evidence offered by the Garnishee except general statements and conclusions to the effect that he had advanced money for the defendant which about equaled the balance left of the settlement, after deduction of the attorney's fee and none of these alleged debts had been pleaded for no reply was filed" by Garnishee (R. 33); that "the judgment of the Court does not affect the attorney's fee claimed, but is for one-half of the settlement reached, or $1970.25"; that the contention "that this is excessive by $15.25", because the execution was for $1955.00, "overlooks the fact that the execution was also for interest on the debt due and the interest was considerably in excess of $15.25" (R. 33).

The St. Louis Court of Appeals affirmed the judgment of the Circuit Court of St. Louis County, Missouri, in its Opinion filed on November 20, 1951 (R. 28-33), and entered its Judgment of affirmance on the same date (R. 36). Petitioner's Motion for a Rehearing or to Transfer to the Supreme Court of Missouri, filed on December 4, 1951 (R. 34), alleged, among other things, that the Court of Appeals erred in failing to recognize that the 'draft' was the joint property of appellant and Jenkins, and therefore immune from garnishment based on a judgment against the latter under the uniform decisions of this State"; "6. By sustaining a judgment for an amount greater than that sought in the process served on appellant, this Court is attempting to deprive him of his property without due process of law, contrary to Amendment XIV. of the Constitution of the United States" (R. 35). This motion was overruled on December 21, 1951 (R. 37).

On January 19, 1952, Petitioner filed his Application to Transfer the case to the Supreme Court of Missouri (R. 39), charging, among other things, that the Opinion of the St. Louis Court of Appeals is in conflict with Amendment XIV. of the Constitution of the United States (R. 41). The application to Transfer from the St. Louis Court of Appeals was denied by the Supreme Court on February 11, 1952 (R. 47).

Then, on a date not shown in the Transcript of Record, but a copy of which was mailed to Milton F. Napier, the Attorney for Respondent herein, on February 25, 1952 (R. 48), Petitioner herein filed an "Application for Leave to File Motion to Reconsider" (R. 47); and on March 10, 1952, this "motion for leave to file a motion to re-consider" was overruled by the Supreme Court of Missouri (R. 48).

SUMMARY OF ARGUMENT.

(1) The St. Louis Court of Appeals did not consider or determine any federal question in determining its conclusion, as shown in the Opinion (R. 28), or in its Judgment (R. 36), or in overruling the Motion for a Rehearing or to Transfer to the Supreme Court (R. 37). The State decision was purely on State grounds (R. 28). No federal Constitutional question was raised by Petitioner, or argued, before the St. Louis Court of Appeals, as is now urged for Certiorari.

The St. Louis Court of Appeals affirmed the judgment of the trial Court, finding that neither the draft, nor the proceeds, $3940.50, was the joint property of defendant, Lawrence Jenkins, and Petitioner; that it was the property of Jenkins, subject only to Petitioner's lien until his 50% attorney fee, or $1970.25, should be paid him for legal services in making settlement of a damage suit; and that the entire collection belonged to Jenkins, subject to the 50% lien. Petitioner denied he owed Jenkins anything. After the return day of the garnishment, they endorsed the draft for $3940.50 and deposited the proceeds in Petitioner's Bank, in a special account with other moneys. It is still there. None of it has been paid to Jenkins. In answer to interrogatories, Petitioner denied he owed Jenkins anything. Respondent filed her Denial, setting forth the facts of defendant's injury and the settlement for $3940.50. The half-interest of Jenkins was attached by garnishment on execution. On trial, this money was found to be the property of Jenkins, subject to the Petitioner's lien for 50%. He was ordered to pay Jenkins' half, or $1970.25, into Court in 12 days, but refused; thus Petitioner subjected himself to the statutory procedure of having a judgment against him for the sum of $1970.25, which the Court found he owed Jenkins.

(2) Under local law, Petitioner owned neither the draft for $3940.50, nor the proceeds. He merely had an attorney's lien for 50%. Petitioner should have deposited the other half in Court. One-half is $1970.25, which is $15.25 more than the principal of $1955.00 due from Jenkins to Respondent. Petitioner does not own the difference of $15.25, since it is Jenkins' money. The Court of Appeals, without considering or adjudging any federal Constitutional question, but purely under local law, ruled that all Petitioner had was an attorney's lien for one-half of the $3940.50, or $1970.25. Under purely local law, the Court of Appeals ruled that the Circuit Court had jurisdiction to render a judgment against Petitioner for $1970.25, under Missouri Statutes, because Petitioner had no property right in either the draft or the proceeds; but had only a lien for 50%, so that for failure to pay Jenkins' half into Court in 12 days, the Circuit Court had the local statutory right to enter a personal judgment against Petitioner for Jenkins' half, $1970.25.

(3) Petitioner first attempted to raise the federal Constitutional question that he was being deprived of due process of law in violation of the 14th Amendment to the Constitution of the United States when he filed his Motion for a Rehearing and to Transfer to the Supreme Court, after the St. Louis Court of Appeals had affirmed the judgment of the Circuit Court; but this was too late to raise a federal Constitutional question. This is particularly true here, because Petitioner, as Garnishee, had an opportunity to offer his defenses and evidence in the Circuit Court, but failed to plead or prove them there, and raised no federal Constitutional issue in the Circuit Court, or in the Court of Appeals, until after the Court of Appeals had heard the case and entered its judgment of affirmance. Where the State Court's decision rests upon non-federal grounds there is no call for federal intervention by Certiorari, and The Supreme Court will not re-examine local law as applied by local Courts. The facts in this case, being ruled by local law do not justify Certiorari, because no federal Constitutional question is involved.

(4) The cases cited by Petitioner in the Petition for the Writ of Certiorari are not in point, because he suffered a judgment against him for disobeying the Court's order to pay into Court $1970.25, which was all he owed Jenkins. It

was no concern of his what the Court would order done with the $1970.25, because it was not his $1970.25, but Jenkins' money. Mrs. Jenkins was entited to $1955.00, pus 6% interest and costs from Jenkins for the support of her children, but the interest was more than $15.25, so all she could get was $1955.00 plus $15.25, and this does not concern Petitioner. All this is determined by local law, so that there is no substantial federal question in the case and the Writ should be denied because, under local law, as the Court of Appeals ruled, its judgment was proper.

ARGUMENT.

I.

The St. Louis Court of Appeals, on Petitioner's appeal from the Circuit Court of St. Louis County, Missouri, did not consider or determine any federal question in reaching its conclusion, as shown in the Opinion (R. 28), or in its Judgment (R. 36), or in overruling the Motion for a Rehearing or to Transfer to the Supreme Court (R. 37). The State decision in the Court of Appeals was purely on State grounds (R. 28). Neither in Appellants (Petitioners) Brief filed therein, nor in his argument before the St. Louis Court of Appeals, did Petitioner raise or argue any such federal Constitutional question as that now urged here for Certiorari. As far as he went, was to urge in his Brief there, under Point V., of his Points and Authorities: that "The Court was without jurisdiction to render a judgment for $1970.25 against Garnishee after he had been served with a garnishment for $1955.00." (Page 7, Appellant's Brief, in St. Louis Court of Appeals). Petitioner made no reference there, or in his argument to any provision of the United States Constitution, nor did he point to a denial of due process by a violation of any provision of the Federal Constitution. The case in the Circuit Court and, again, in the St. Louis Court of Appeals was ruled strictly on local and not federal law, and on theory controlled only by applicable local law. Without the intervention of any federal Constitutional question before the St. Louis Court of Appeals the Court affirmed the Circuit Court on the argument of Respondent, both there and here, substantially as follows:

Neither the draft, nor the subsequent money proceeds thereof, $3940.50, was the joint property of defendant, Law-

rence Jenkins, and the Garnishee, Petitioner here. It was the property of defendant, Lawrence Jenkins, subject only to Garnishees "holding lien' until his 50% attorney fee, or $1970.25, be paid him by defendant for services rendered him in making the settlement for the injuries alleged to have been suffered by defendant.

In **State v. January, 182 S. W. 2d 323, 353 Mo. 324,** the Supreme Court of Missouri, in discussing the relative rights of attorney and client in proceeds of collections, to make which the attorney had been employed, said:

> "The relation between attorney and client is one of high trust and confidence, exacting the utmost good faith on the part of the attorney, entitling the client to full information as to his rights and interest and to be so placed as to deal with the attorney at arms length (citing cases). **Although the agent effecting a collection be entitled to a commission, the fund or mass belongs to the principal until the agent exercises his right and appropriates his commission.** Commonwealth v. Hutchins, 232 Mass. 285, 122 N. E. 275, 276 (1, 2); Commonwealth v. Lannan, 153 Mass. 287, 26 N. E. 858, 11 L. R. A. 450, 25 Am. St. Rep. 629, Holmes, J., writing,"

State v. January, 182 S. W. 2d 323, 353 Mo. 324.

The rule should be the same in civil cases, as it is in other cases. The draft was made out to Lawrence Jenkins, and William C. Barnett, his attorney (R. 13). Appellant (Petitioner here) testified the draft of $3940.50 which he received represented the amount the company was paying Lawrence Jenkins by reason of his injuries. When the Court said to him: "Q. You werent injured: Lawrence Jenkins was injured," Petitioner answered: "A. The draft was made jointly to cover my lien for attorney's fees" (R. 18). He then told the Court it was his contention that there was nothing coming to Lawrence Jenkins. This testimony was taken subject to plaintiff's objection (R. 18). Petitioner further testified he "entered into a contract for attorney's fees for half of whatever was recovered (R. 19). He then testified he "would give him (Jenkins) substantial sums of

money from time to time" (R. 19). The exact amount was never shown; but there is no evidence that any of these advances were made for the actual prosecution of the claim or suit, for which he would be required to get reimbursement. If made, the record shows they were made for reasons personal to Jenkins (R. 19, 20) and, for the reimbursement of which he would have no attorneys lien. Under his own evidence, he collected a net sum of $3940.50 (R. 18) and, under his contract with his client was entitled to 50% thereof as his attorney's fee (R. 19), or $1970.25. The law affords him an attorney's "holding lien" for this fee; but he had no greater rights in that draft. The fund belonged to his client. His attorney's lien went no further than to protect him in his fees that were coming to him out of that case, not to protect him for personal advancement to Jenkins for matters that in no wise directly concerned the prosecution of Jenkins' claim.

The evidence disclosed that Petitioner and defendant dealt freely and understandingly in the withholding of their endorsements from the check and in delaying its collection until May 2, 1950, which would be "after" the return day of the garnishment (R. 15, 19); then he and Jenkins endorsed it, and then that check representing the sum of $3940.50 was deposited by Petitioner in a special account in Security National Bank, Savings & Trust Co., in St. Louis, Mo. (R. 15). The identical funds are still on deposit at the bank. They are on deposit there along with considerable other funds. "No part of this money has been paid to Lawrence Jenkins" (R. 15). At the time he was served with this garnishment, January 12, 1950, he had the check for $3940.50 (R. 16).

The interrogatories were filed May 3, 1950 (R. 3). As of that day, the interrogatories asked: "Have you now in your possession, custody or charge, any * * * moneys, credits or effects belonging to the defendant, Lawrence Jenkins?" (R. 3). On May 5, 1950, Petitioner answered a categorical "No" to each of the questions asked in the interrogatories (R. 4). He knew on that day that he had the draft endorsed by himself and Jenkins, and had deposited the same in Security National Bank on May 2, 1950; yet he filed a denial that he had such money or credits in his possession, custody or charge when he answered on May 5, 1950. He

also knew then that this fund belonged to his client and not to him, subject only to his 50% lien. On May 5, 1950, plaintiff filed her reply (Denial) to the answers of the Garnishee (R. 5). This reply not only set forth the plaintiff's cause of action against the defendant for unpaid support money for the children in the sum of $1955.00, but set forth the transaction between defendant and Garnishee with reference to the collection of the settlement of $3940.50 by the draft due Jenkins for his injuries, charged that this draft constitutes property in the possession of Garnishee belonging to defendant, and set out Section 1563 Mo. R. S. A., now Section 525.040 Mo. R. S., 1949, concerning the effect of Notice of Garnishment (R. 5). Its effect was of attaching the draft in question, or the proceeds thereof, money, rights, credits, etc. from the time of the service of the garnishment, "or which may come into" Garnishee's "possession or charge, or under his control" between that time "and the time of filing his answer" (R. 5). This section of the Statutes did provide that the Garnishee shall not be liable to a judgment in money on account of such draft, **unless it was converted into money since the garnishment, or if he fail to deliver it into Court or to the Sheriff on the Court's order,** (R. 5, 6). Petitioner filed no reply to this pleading, and never did amend his answers to the interrogatories; but he went to trial on June 7, 1950, still denying that he had any money or credits belonging to the defendant, when his own evidence, above referred to, showed that, at that time the draft had been turned into money, and that he had it in his possession in his bank account in Security National Bank & Trust Company, and that no part of those identical funds had been given to Lawrence Jenkins.

Section 1563 Mo. R. S. A., now Section 525.040 Mo. R. S., 1949.

It was, and is, Respondent's argument that both under the evidence, Petitioner's own testimony in the case, and under the local law applicable to attorney and client in such cases, this settlement money represented by this draft was the property of defendant, subject only to the 50% lien of Petitioner for his fees. This was not changed when, on May 2, 1950, the Petitioner and defendant, acting together, endorsed this draft and deposited it, or caused it to be deposited, in Security National Bank & Trust Company in Peti-

tioner's bank account, where it not only was on May 2, 1950, and on May 5, 1950, when the reply to Petitioner's answers was filed, but where it was on June 7, 1950, the day of trial of this case in the Circuit Court. And we have shown that Petitioner had these funds in his bank account on May 5, 1950, when Petitioner filed his categorical "No's" as his answers to the interrogatories. At the trial in the Circuit Court it was shown that the draft was the property of defendant, Jenkins, subject only to the lien of 50%, that this ownership in defendant, Jenkins, had continued, and was still present, and is present now, by the conversion of the draft into money now on deposit in Security National Bank & Trust Company, one-half of which only would completely satisfy Petitioner's then lien.

II.

Petitioner owned neither the "draft," nor the proceeds thereof. He merely had a "holding lien" on his client's cause of action when he took his case, and this lien followed the draft into the money which he had on deposit on May 2, 1950, and even on the day of trial, June 7, 1950,

Barnes Hospital v. Quinlivan, et al., 136 S. W. 2d 332 (St. Louis Court of Appeals).

If he needed to, he could easily have called the Court's attention to the fact that the money is impressed with such lien, and asked the Court to protect his rights and interests. He could have asked the Court in that action at law to do this very thing, and obtain an order, on proper pleadings, allowing him to appropriate 50% of the funds to his lien, and to satisfy it in that way, and deposit the balance of the fund in Court for its orders thereon. If he had further claims on the balance of the fund, or any part thereof, he could have litigated that question too in that very action at law, on proper pleadings, under local law. However, he was satisfied with the one word: "No" for his pleading, raised no such issues as he is now attempting to raise on Certiorari here and has not put himself in position to have such relief,

Barnes Hospital v. Quinlivan, supra .

The admitted facts are that the total fund on hand on the day of trial was $3940.50, that Garnishee had a lien thereon

for his fee of 50%. Absent the assignment taken, in writing, after the garnishment was served on Garnishee (R. 30), Garnishee was entitled only to one-half the fund, or $1970.-25. This left the sum of $1970.25, as still in the possession of Garnishee and subject to garnishment as defendant's money. This is the fund ordered turned into Court. Defendant filed no pleadings and made no claim to it. The evidence shows that on January 12, 1950, defendant owed plaintiff $1955.00 and 6% interest, under her judgment for support of the children, as of January 12, 1950, and that, up to May 1, 1950, the return day of the garnishment, the defendant would continue to become indebted to plaintiff for the additional sums of $75.00 per month, plus 6% interest. There was, therefore, subject to the Court's orders as to this fund in litigation the additional sum of $15.25 to which Garnishee was not entitled because the final judgment disposed of his rights to the fund. Since Garnishee is not entitled to this $15.25, he is in no position to complain about it here, and Garnishee (Petitioner here) can not be concerned with what the Court ordered done as to that sum.

Under local law, and without considering or deciding the question now urged by Petitioner, the St. Louis Court of Appeals correctly ruled that "All the Garnishee (Petitioner here) had, by reason of his services as attorney, was a lien, and as we stated in **Koenig v. Leppert-Roos Fur Co., Mo. App., 260 S. W. 756**: 'A lien is not a property right in or to the thing itself, but constitutes a charge or security thereon' " (R. 32).

There is no question, but that the St. Louis Court of Appeals ruled, on purely local law, that the Circuit Court had jurisdiction to render the judgment for $1970.25 against the Garnishee (Petitioner herein), under the Missouri Statutes, because he had no property right in either the draft, or the proceeds thereof, when he deposited them in the Security National Bank & Trust Company, after the return day of the garnishment; but that he had only a lien thereon for his fee to the extent of 50%. Upon the conversion into money since the garnishment was served upon him and, upon his failure to comply with the order to pay one-half the fund into Court within twelve days, he became liable to a judgment in money, under Missouri law, on account of such draft or check, and the proceeds thereof.

Section 525.040, Mo. R. S., 1949, provides:

> "* * * he shall not be liable to a judgment in money on account of such * * * drafts, checks or other choses in action, unless the same shall have been converted into money since the garnishment, or he fail, in such time as the Court may prescribe, to deliver them into Court, or to the Sheriff or other person designated by the Court."

III.

In neither the Motion to Amend the Judgment and Opinion, and Motion for a New Trial, filed July 21, 1950 (R. 24), nor the Motion to Amend the Judgment, filed August 3, 1950 (R. 25), both in the Circuit Court, did Petitioner attempt to raise a federal Constitutional question.

Petitioner's first attempt to raise such a Constitutional question was in his Motion for a Rehearing or to Transfer to the Supreme Court, which he filed, after Opinion and Judgment, in the St. Louis Court of Appeals (R. 34).

In paragraph 6, of that Motion for a Rehearing he says: "By sustaining a judgment for an amount greater than that sought in the process served on appellant this Court is attempting to deprive him of **his** property without due process of law contrary to Amendment XIV. of the Constitution of the United States" (R. 35). The St. Louis Court of Appeals did not consider or pass upon the federal ground therein attempted to be set up. It ordered that the Motion for a Rehearing or to Transfer to the Supreme Court "be and is hereby overruled" on December 21, 1951, and, of its own motion modified its Opinion, but without passing upon any federal grounds (R. 37).

> In **Bowe v. Scott 34 S. Ct. 769, 233 U. S. 658, 58 L. Ed. 1141,** it was said:
>
> "It is elementary that a mere assertion in a State Court of a right under the Constitution of the United States in a petition for a rehearing affords no ground for invoking the jurisdiction of this Court unless the Court below in dealing with the petition for rehearing considers and passes upon the federal ground therein relied upon."

Manifestly, that rule applies here, for the situations are similar, and the question, even if there were merit in it, not having been raised earlier, affords no basis for jurisdiction in Certiorari here.

Petitioner had his chance to make his defenses and to offer competent evidence, but he did neither in the Circuit Court and waited in the St. Louis Court of Appeals for the judgment to be there again found against him before he attempted to raise the Constitutional question upon which he seeks to invoke jurisdiction here.

In **Southern R. Co. v. Durham, 45 S. Ct. 51, 266 U. S. 178, 69 L. Ed. 231,** it was held:

> "When a party in a State Court, with full opportunity, offers no evidence to sustain defenses alleged under the Constitution, a judgment overruling the defense does not deprive him of federal rights."

The Circuit Court's summary of the situation, as found on page 22 of the Transcript of Record, shows the opportunities Petitioner had, both under the law and the offers of the Court, to hear him there. He took no advantage of either, but waited to first raise his federal question in his Motion for a Rehearing in the Court of Appeals, after all avenues previously open to him had been neglected. Surely, now is no time to seek such relief by Certiorari.

In **Young v. Ragen, 69 S. Ct. 1073, 337 U. S. 235, 93 L. Ed. 1333,** it was held that the United States Supreme Court will not review decisions of a State Court, which rest upon adequate non-federal grounds. The record here shows that the decision of the St. Louis Court of Appeals in this case does rest upon adequate non-federal grounds, and there is no call here for federal intervention on the facts in this record.

Again, in **Hammerstein v. Superior Court of California, 71 S. Ct. 521, 340 U. S. 622, 95 L. Ed. 586,** we have a similar pronouncement that judgments of a State Court will not be reviewed by the Supreme Court, if they rest upon an adequate State ground.

In the case at bar, that judgment did rest upon adequate State grounds. Petitioner had no property rights in the money of his client, gotten in the settlement for him—he

had a lien for his fee which was adequately protected by the judgment under local law. He got every cent that he was entitled to under that judgment but comes here with the claim that, because he was required to pay over the sum of $15.25 (which did not belong to him), he was denied due process of law against the provisions of the 14th Amendment. No less sound basis for Certiorari could be found for the Petition for the Writ. He really asks a re-examination here of the local law, notwithstanding the rule here is otherwise.

In **Skelly Oil Co. v. Phillips Petroleum Co., 70 S. Ct. 876, 339 U. S. 667, 94 L. Ed. 1194,** the contrary was held, to the effect that the Supreme Court does not re-examine local law as applied by the local Courts. Under such local law Petitioner received all that he was entitled to, and the record here proves it.

In Petitioner's Application for Transfer to the Supreme Court, filed January 19, 1952 (R. 39), he contents himself with the statement: "That the Opinion is in conflict with Amendment XIV. of the Constitution of the United States (R. 41); and in his Suggestions in Support of the Motion to Transfer to the Missouri Supreme Court (R. 42), he says: "the action of the Court of Appeals in affirming the judgment is an attempt to deprive applicant of his property without due process of law, contrary to Amendment XIV. of the Constitution of the United States" (R. 45).

The facts in this case, ruled on local law, and involving the application of Missouri statutes, indicate no federal Constitutional question in this case which would justify the issuance of Certiorari.

IV.

The cases cited by Petitioner under his "Authorities and Argument" on page 5 of the Petition for the Writ of Certiorari are wholly inapplicable to the situation that was before the Circuit Court and the St. Louis Court of Appeals. Here, Respondent had a continuing judgment in a divorce case, providing for the payment of $75.00 a month for the support of two minor children. The decree was granted September 26, 1947 (R. 1). That judgment, pursuant to Missouri Statutes, carried 6% interest on each unpaid installment. Only $70.00 had been paid and $1955.00,

and 6% interest, was due and unpaid when execution issued. The execution called for $1955.00 and 6% interest, together with costs, pursuant to local law. That was the sum to which Respondent was entitled when the statutory garnishment was served on Petitioner, and that execution and garnishment called for $1955.00, and interest at 6% per annum, together with costs. Under local law, Petitioner owed no more to defendant in the execution, Lawrence Jenkins, than $1970.25. The Circuit Court so found and the St. Louis Court of Appeals, under local law, affirmed this finding and judgment. Petitioner had been given twelve days in which to pay into Court the sum which he owed to Lawrence Jenkins, the defendant in the execution. Under Petitioner's contract for his contingent fee, that was the maximum amount he owed Jenkins. Local law, Section 525.040, Mo. R. S., 1949, provided that, for failure to obey an order to pay into Court or to the Sheriff, or other person designated by the Court, within the time named by the Court, a personal judgment could be rendered against the garnishee for the sum found by the Court to be due from him to the defendant, Jenkins. Petitioner disobeyed the Order to pay into Court and suffered the personal judgment to go against him under the Statute. Had he paid the $1970.25 into Court, he would have been discharged under the garnishment. He disobeyed the Order and the judgment went against him, not for what was due Respondent, Esther E. Jenkins, but for what the Court found Petitioner owed Lawrence Jenkins, his client. That was the only sum for which Petitioner could be liable in the garnishment proceeding. 6% on the principal, plus $1955.00, due Respondent far exceeded $1970.25, as both the Circuit Court and the Court of Appeals found in their rulings, Opinion and Judgment; but that is all that Respondent could recover through her execution and garnishment proceedings provided by local law, because Petitioner owed no more than $1970.25 to Jenkins. It was the sum he should have paid into Court in the first place, and been discharged from the garnishment, because none of that $1970.25 was his money, as both the Circuit Court and Court of Appeals found. Instead, he denied he owed Jenkins anything, and now, at least tacitly, admits he owes $1955.00, but haggles about the other $15.25 which does not belong to him. We see no grave, substantial federal Constitutional question in

this case, denying due process of law to Petitioner under the 14th Amendment to the Constitution of the United States, in the circumstances in this record. He had due process, his day in Court and an opportunity to defend, but makes an issue over $15.25 which does not belong to him and then invokes the aid of the United States Supreme Court, by Certiorari, to help him keep what he does not own.

CONCLUSION.

In the circumstances shown in this record, Petitioner is not entitled to a Writ of Certiorari, and his Petition should be denied and dismissed, at his costs, for want of a substantial federal question in the case, because the St. Louis Court of Appeals was legally correct in its affirmance of the judgment of the Circuit Court.

Respectfully submitted,

MILTON F. NAPIER,
408 Olive Street,
St. Louis 2, Missouri,

Attorney for Respondent.